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10/30/98

Washington, DC
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October 30, 1998

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
The Portals. 445 Twelfth Street, S.W.
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Ex Parte in CC Docket Nos. 96-98; 98-79;
98-103; 98-161; 98-168; CCB/CPD Docket No. 97-30

Dear Ms. Salas:

In a letter filed today in the above-captioned dockets, the Association for Local Telecommunications Services ("ALTS") asks the Commission to adopt specific language in its order determining the jurisdictional nature of certain ADSL tariffs. The language suggested by ALTS is designed to insure that the FCC's ADSL tariff order provides no precedent for and does not in any way implicate the question of whether reciprocal compensation applies to dial-up connections between ISP customers and ISPs. Time Warner Telecom ("TWTC") urges the Commission to adopt the language proposed in the attachment to the ALTS letter. It is critical that dedicated ADSL offerings be viewed as completely distinct from dial-up ISP traffic for the purposes of reciprocal compensation.

On behalf of TWTC, I have attached a document that is intended to complement the ALTS letter. The attached paper is intended to assist the Commission in achieving several policy objectives. First, it explains why, even assuming that ISP dial-up traffic is interstate, the FCC can still hold that reciprocal compensation rates in existing and future interconnection agreements apply to that traffic. Thus, the FCC can essentially leave undisturbed the many state decisions that have concluded that reciprocal compensation applies to ISP traffic. Second, the paper explains how the FCC can achieve this result based on its authority under Sections 152(a) and 201-205 rather than under Section 251(b)(5). Finally, by leaving enforcement to the states, the attached analysis avoids any conflict with

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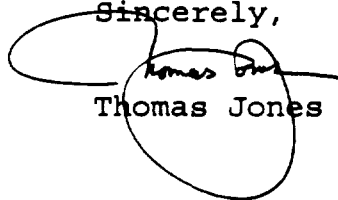
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the holding in Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997).

The attached paper is styled as a proposed insert to an FCC order. However, if the FCC decides to issue a notice of inquiry or notice of proposed rulemaking on this issue, TWTC urges the commission to seek comment on the analysis presented.

Two copies of this letter and the attached analysis will be submitted in each of the above-referenced dockets. If you have any questions please call me at (202) 429-4732.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas Jones", is written over a large, loopy circular flourish.

Thomas Jones

cc: Paul Gallant
Tom Power
Jim Casserly
Kyle Dixon
Kevin Martin
Christopher Wright
Kathryn Brown
Jim Schlichting

**PROPOSED INSERT IN FCC ORDER REGARDING THE APPLICATION OF
RECIPROCAL COMPENSATION TO DIAL-UP CALLS TO ISPS**

We have concluded above that a circuit-switched, dial-up call between an ILEC customer and an ISP served by a CLEC that is then converted by the ISP to TCP/IP protocol and carried across state lines is interstate in nature. In addition, there is no dispute that carriers that exchange this form of traffic are acting as common carriers. We have long held that Sections 152(a) and 201-205 grant us the authority to regulate the exchange of jurisdictionally interstate traffic between carriers. For example, these provisions govern access rates incumbent LECs charge long distance carriers for the exchange of interstate interexchange traffic.¹ Thus, Sections 152(a) and 201-205 grant us the authority to regulate the exchange of interstate ISP traffic between LECs.

Although predominantly interstate, this Commission has consistently and for many years left it up to the states to set the rates governing the traffic between ISP subscribers and ISPs.² Thus, we have classified ISPs as end users, and ISPs have purchased business lines out of state tariffs in order to receive traffic from their subscribers. For the purposes of regulation, therefore, calls delivered to ISPs have been treated as local calls. We have never implicitly or explicitly limited the application of state regulation in this regard to rate regulation. The logical implication is that ISPs shall be treated as end users for all purposes.³

¹ See MTS and WATS Market Structure, Third Report and Order, 93 FCC 2d 241 (1982) aff'd National Ass'n of Reg. Util. Comm'rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984).

² See Access Charge Reform, First Report and Order, 12 FCC Rcd 15982, ¶¶ 344-348 (1997); Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Notice of Proposed Rulemaking, 4 FCC Rcd 3983, n.71 (1989); Filing and Review of Open Network Architecture Plans, Phase I, Memorandum Opinion and Order, 4 FCC Rcd 1, ¶ 318 (1988); Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Order, 3 FCC Rcd 2631, n.8 and n. 53 (1988); Northwestern Bell Tel. Co. Petition for Declaratory Ruling, Memorandum Opinion and Order, 2 FCC Rcd 5986, ¶ 20 (1987); MTS and WATS Market Structure, Phase I, Memorandum Opinion and Order, 97 FCC 2d 682, ¶ 83 (1983).

³ For example, incumbent LEC costs and revenues associated with serving ISPs are allocated to the state jurisdiction under Part 36 of the FCC's rules.

We conclude that an intrinsic aspect of this approach is that reciprocal compensation applies to the ISP traffic exchanged between LECs. We are not alone in understanding the governing regulatory regime in this manner. As discussed above [we assume the FCC would have discussed this issue earlier in the order], all 23 of the states and both federal district courts that have considered whether reciprocal compensation applies to ISP traffic have held that it does.⁴ Indeed, given that ISPs are exempt from paying interstate access charges, the only mechanism for compensating carriers for the exchange of this traffic has been reciprocal compensation. Moreover, we need not rely on the terms of Section 251(b)(5) for this conclusion. As discussed, our authority over interstate ISP traffic arises from Sections 152(a) and 201-205.⁵

The policy of treating ISPs as end users was well established by the time Congress passed the 1996 Act and at the time when LECs entered into their interconnection agreements. Those agreements must be construed to reflect this fact. Thus, while many interconnection agreements limit the application of reciprocal compensation to local calls and local traffic, it was accepted industry practice that such categories include calls to ISPs and other information service providers.⁶ It is hornbook law that contracts must be construed to incorporate industry

⁴ While we may not, for the reasons explained above, agree with the jurisdictional analysis in several of the state and federal court decisions in question, we nevertheless agree with the ultimate conclusion that reciprocal compensation applies to ISP traffic.

⁵ In essence, these provisions grant the FCC authority to regulate the exchange of ISP traffic just as certain provisions of Section 251 give the FCC authority over other aspects of local competition. See Iowa Utils. Bd. v. FCC, 120 F.3d 753, 794 n.10 (8th Cir. 1997) ("Iowa Utils. Bd.") (listing provisions that grant the FCC authority over aspects of local competition such as the definition of unbundled elements and of unreasonable restrictions on resale).

⁶ For example, Bell Atlantic stated in its reply comments in the FCC's local competition proceeding that "[i]f these [reciprocal compensation] rates are set too high, the result will be that new entrants, who are in a much better position to selectively market their services, will sign up customers whose calls are predominantly inbound, such as credit card authorization centers and Internet access providers." See Reply Comments of Bell Atlantic at 21, CC Docket No. 96-98 (filed May 30, 1996).

norms (in this case imposed by law) unless the parties unambiguously state that they do not wish to be bound by these norms.

Furthermore, if reciprocal compensation were not to apply to dial-up ISP traffic, no exchange rate would apply to this traffic at all. Another basic principle of contract law is that contractual provisions should be construed wherever possible to avoid unreasonable results.⁸ It is unreasonable to conclude that carriers would willingly enter into an agreement without providing for any exchange rate for a class of end users that is well-known to receive much more traffic than it originates.

Thus, federal policy requires that any interconnection agreement that does not unambiguously reflect the intent of the parties to exempt ISP traffic from reciprocal compensation be construed to require the application of reciprocal compensation to that traffic. For example, agreements limiting reciprocal compensation to "local calls" or to "calls terminating within the same exchange" or to "local traffic" or those prohibiting reciprocal compensation for "interexchange" or "toll" traffic would not exclude dial-up ISP traffic from reciprocal compensation. These terms and phrases simply incorporate the industry and regulatory practice of treating calls to ISPs as local calls.

Moreover, any agreement that results in the exclusion of ISP traffic from reciprocal compensation would violate the requirements of Section 202(a). That provision states as follows:

⁷ See 4 Arthur Linton Corbin, Corbin on Contracts § 555 (1960) ("In numberless well-considered cases, proof of local or trade usage, custom, and other circumstances has been allowed to establish a meaning that the written words of the contract would never have been given in the absence of such proof. It is not necessary that words should be unusual words that are 'ambiguous on their face' in order to admit evidence of special usage. Such evidence often establishes a special and unusual meaning definitely in conflict with the more common and ordinary usages").

⁸ See 4 Samuel Williston & Walter H.E. Jaeger, A Treatise on the Law of Contracts § 601 at 308 (3d ed. 1961) ("It is also well settled that the words of a contract should be given a reasonable construction, where that is possible, rather than an unreasonable one; and the court should likewise endeavor to give a construction most equitable to the parties, and one which will not give one of them an unfair or unreasonable advantage over the other.") (citations omitted).

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device.

Carriers perform the same functions when exchanging local voice traffic as when they exchange ISP traffic over circuit-switched, dial-up connections. Under Section 202(a), carriers may not perform these "like" services on terms and conditions that are either "directly or indirectly" discriminatory. Refusing to pay compensation on traffic delivered to ISPs, while paying compensation on all other local calls, would unquestionably result in indirect discrimination against ISPs providing interstate services.¹⁰ This practice would essentially deny ISPs and ISPs alone among end users the opportunity to be served by competitive LECs. This is because, if competitive LECs cannot be compensated for the cost of delivering traffic to ISPs, they will not serve them.

Finally, we have decided not to change on a going forward basis the policy of applying reciprocal compensation to the exchange of dial-up ISP traffic. Any attempt to set a rate for this traffic at this time would be highly disruptive to the local marketplace. The 23 state decisions have provided a measure of stability to the regulatory environment governing the exchange of ISP traffic up until now. Reopening this issue, for example to set a national rate for the exchange of ISP traffic, would undermine the existing stability and would likely inhibit or even prevent CLECs from attempting to serve ISPs. In any event, it is not clear that we have the authority to alter reciprocal compensation rates in existing interconnection agreements.¹¹

The state commissions of course have the authority to revisit reciprocal compensation rates in the future. Given their considerable experience in this area and this Commission's limited resources, we believe that the states are better able to adjust reciprocal compensation rates and local business line rates as needed to ensure that carriers exchanging ISP traffic

⁹ 47 U.S.C. § 202(a).

¹⁰ See National Assoc. of Reg. Util. Comm'rs v. FCC, 746 F.2d 1492 (D.C. Cir. 1984) (FCC may, in order to prevent unlawful discrimination, prohibit resale and sharing restrictions in state WATS tariffs where those tariffed services are used by an interstate carrier to provide interstate services).

¹¹ See Iowa Utils. Bd., 120 F.3d at 803-804 (holding that the FCC may not review state decisions made pursuant to Sections 251-252).

are adequately compensated. However, we reserve the right to take further action in the future (to the extent permitted by the Iowa Utils. Bd. decision) to insure that reciprocal compensation rates are just and reasonable when applied to interstate ISP traffic.

In sum, we hereby clarify that, pursuant to Sections 152(a) and 201-205, the reciprocal compensation rates in existing interconnection agreements apply to the interstate ISP traffic already exchanged between LECs as well as to ISP traffic exchanged in the future. We expect the states to enforce this decision pursuant to their authority to enforce interconnection agreements.¹² In addition, we also expect the states to require ILECs to pay CLECs interest on all compensation due, in accordance with relevant state law.

¹² Because we leave the enforcement of our decision to the states, this order comports fully with the holding in Iowa Util. Bd., 120 F.3d at 803-804 that states have exclusive authority to enforce interconnection agreements. Our action here is effectively no different than any other FCC order dealing with an aspect of local competition (such as defining unbundled elements or impermissible restrictions on resale) over which the FCC has been granted authority. Furthermore, to the extent the FCC intervenes in the future to insure just and reasonable rates for the exchange of ISP traffic, such intervention would again be no different from an FCC order altering or clarifying rules applicable to aspects of local competition over which the FCC has jurisdiction.